OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include a disability discrimination claim based on the "direct threat" (*i.e.,* risk of harm) theory, retaliation, temporary medical conditions, and sexual harassment.

Also included in this issue is a review of some recent Supreme Court decisions addressing issues relating to disability discrimination and compensatory damages.

The *OEDCA Digest* is available on the World Wide Web at: www.va.gov/orm, and on the Intranet at: *vaww.gov/orm/oedca/digest*.

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I

NO RETALIATION FOUND BECAUSE COMPLAINANT FAILED TO PROVE LESS FAVORABLE OR DIFFERENT TREATMENT AFTER CONTACTING AN EEO COUNSELOR

The complainant, a GS-5 health care worker, claimed that she was performing duties in excess of her position description, and was therefore entitled to a promotion to a higher grade, consistent with the nature of the duties she was performing.

Evidence in the record indicated that she had to assume additional duties due to the illness and extended absence of a higher-graded co-worker. When it later became apparent that the co-worker would not be returning from sick leave, her supervisor contacted a human resources official to inquire about a permanent promotion for her. The official told him, however, that the most he could do for her at that moment was to give her a temporary promotion while undertaking efforts to obtain a permanent "accretion of duties" promotion. Approval of such a promotion would require a new position description (PD) that accurately described her new duties and responsibilities.

Two months later, the complainant received a temporary promotion, not to exceed 120 days. However, during this 120-day period her supervisor's employment was terminated before he was able to write the new PD. Thereafter, her temporary promotion expired and, without a revised PD, she reverted to her regular grade. In response, she contacted an EEO counselor alleging various EEO violations. Shortly thereafter, she went out on leave for medical reasons. Four months later she resigned and filed a formal EEO complaint alleging, among other things, that the agency's failure to upgrade her position during the ten month period prior to her resignation was due, in part, to her contact with the EEO counselor.

After reviewing the record in its entirety, OEDCA accepted an EEOC administrative judge's recommended decision finding that the complainant had failed to satisfy her threshold burden of proving a *prima facie* case of retaliation. More specifically, OEDCA found, among other things, that while her contact with the EEO counselor constituted statutorily protected activity, she was unable to prove any nexus (*i.e.,* connection) between that protected activity and her failure to receive an "accretion of duties" promotion.

As the facts clearly demonstrated, the complainant's treatment following her protected activity was no different than her treatment before the protected activity with regard to the promotion issue. In other words, she asked for, but did not receive, a permanent promotion during the six month period prior to her EEO activity, and there was no change in that regard during the four month period following her EEO activity. Hence, her failure to receive a promotion was not due to retaliation because of her EEO activity.

II

EVIDENCE OF RACIAL BIAS AND

RETALIATORY INTENT, ALONG WITH EVIDENCE CONTRADICTING THE REASONS FOR COMPLAINANT'S NONSELECTION, RESULTS IN A FINDING OF DISCRIMINATION AND RETALIATION

The complainant, an African-American, applied but was not selected for a GS-13 computer specialist position. The selecting official (Caucasian and hereinafter referred to as the "SO"), instead chose an Asian-American. The complainant had previously filed EEO complaints against the SO and other management officials. The complainant alleged that his nonselection was due, in part, to his race and prior EEO complaints. None of the GS-13-level positions of the type in question were held by African-Americans.

The SO testified that the selectee was better qualified because the quality and quantity of his work was better than the complainant, and that the complainant was "not GS-13 material." He failed, however, to elaborate or provide examples to support this assertion. On the other hand, the complainant's most recent performance appraisal prior to his nonselection stated that he had substantially exceeded performance requirements. He had also received a special contribution award. The performance appraisals of the selectee, who had transferred from another facility, were not contained in the record.

The complainant's evidence included testimony that the SO harbored a racial bias against African-Americans. One witness, for example, testified that the SO had stated, in her presence, that he "was allergic to Blacks." Others testified that he addressed African-Americans as "you people." Still others told of an incident in which he brought in a newspaper article that included a picture with the letters "KKK" appearing on the side of a vehicle and passed it around the workplace with the intent of upsetting African-American employees.

The record also indicated that the SO was so upset with the complainant's prior EEO activity that he had previously told an EEO counselor that he might file a lawsuit against the complainant. He also inquired about whether he could file an EEO complaint against the complainant because of the complainant's EEO complaints against him.

Remarks of this nature, which the SO must certainly have realized would be reported by the counselor to the complainant, are of the type likely to have a chilling effect on a complainant's exercise of his EEO rights and would, by themselves, constitute reprisal *per se* (a finding of reprisal that does not require proof of an adverse action against a complainant). More importantly, however, they convincingly demonstrate a clear inclination on the part of the SO to retaliate against the complainant.

Accordingly, OEDCA concluded that the preponderance *(i.e.,* the weight*)* of the evidence in the record regarding the SO's racial bias and retaliatory intent, along with other evidence tending to cast doubt on his reasons for the complainant's nonselection, supported the complainant's contention that his nonselection was due to his race and prior EEO activity.

III

TEMPORARY MEDICAL CONDITION NOT CONSIDERED A DISABILITY UNDER THE *REHABILITATION ACT*

The complainant was hired under a temporary appointment as a cafeteria worker at a VA medical center. Approximately 6 months after being hired, the cafeteria was converted into a "Food Court" operation, and the complainant was assigned to work in the *Burger King* ("BK") franchise. Under the terms of the franchise, the VA was required to operate within BK's established standards. The complainant was fully trained in her new duties with the franchise.

According to the Assistant Chief of the Canteen Service, the complainant was unable to make sandwiches within BK's established time frames. According to BK's sales representative, the complainant was taking three minutes to make a sandwich that should only require 30 seconds to prepare. The Assistant Chief also noted that she was sarcastic and insubordinate, wasted time, and had attendance problems. Her supervisor counseled her concerning these problems and gave her 30 days to correct her deficiencies. When she failed to show improvement, she received a notice of termination because of unsatisfactory work performance.

The complainant filed a discrimination complaint alleging, among other things, that her termination was due to her disability, which she described as a "heat rash" that she developed while working near the hot stoves. She claimed, in essence, that by firing her, the agency failed to accommodate her on-the-job injury in violation of the *Rehabilitation Act of 1973*.

OEDCA disagreed, finding instead that the complainant failed to prove that she was an "individual with a disability", as that term is defined by EEO laws and regulations. More specifically, OEDCA found that medical evidence in the record conclusively demonstrated that her heat rash was, at most, a temporary medical condition that did not substantially limit any of her major life activities, including her ability to work.

The Equal Employment Opportunity Commission has consistently held that temporary medical conditions will generally not support a finding that an individual is disabled for purposes of the *Rehabilitation Act.* Having failed to prove that her medical condition constituted a disability, the agency was under no duty to accommodate her condition.

IV

DEPARTMENT'S REFUSAL TO HIRE AN OTHERWISE QUALIFIED APPLICANT BECAUSE OF A PERCEIVED HEALTH RISK VIOLATED THE *REHABILITATION ACT* DUE TO FAILURE TO CONDUCT AN INDIVIDUALIZED ASSESSMENT

OEDCA recently accepted an EEOC administrative judge's recommended decision finding that a complainant was discriminated against because of a perceived disability (back problems).

The complainant had applied and was

selected for a position as a retail sales clerk in the Canteen Service. The offer of employment was contingent on passing a pre-employment medical examination. He subsequently received notification, following his examination, that the offer of employment had been withdrawn because of concerns about his medical history -- specifically, his prior back injury. Because the position in question required lifting "moderately heavy" items, the examining medical officer, a nurse practitioner with no apparent expertise in back injuries or back problems, recommended against hiring the complainant. Although she found him to be "healthy" in all other respects, she concluded that he should not lift more than 10 pounds. Her fear was that he might re-injure his back because of the lifting requirements of the position.

The complainant asserted that he does not have any medically imposed lifting "restrictions." Moreover, he claimed that he was fully able to perform the essential duties of the position without risk to his health or safety, and that, despite his prior back injury, he has performed similar jobs requiring him to lift 50-100 pounds without injury or loss of time at work.

The examining medical officer offered no explanation of the medical standards used for her determination that the complainant could not or should not lift more than 10 pounds. Nor did she specify the nature, severity, probability, or imminence of the perceived potential harm. There is no indication in the record that Canteen Service or Human Resources personnel inquired into whether a job accommodation might reduce the perceived risk to an acceptable level. Finally, there is no evidence that any consideration was given to the complainant's prior work history in similar positions.

During the course of a supplemental EEO investigation, the Department offered the opinion of a physiatrist who had examined the complainant. He testified, however, that the complainant's back exhibited "full range of motion", and that there was "no spinal tenderness" and "no para-spinal muscle tenderness or spasms." He further noted that while there was "no way to completely predict" whether lifting heavy items would cause further injury, "it could." Aside from noting the possible risk, he was unable to offer any specific information regarding the severity, probability, or imminence of the potential harm.

OEDCA found, as did the EEOC administrative judge, that management officials failed to conduct the requisite risk analysis required by EEO law and regulations (in particular, 29 C.F.R. Section 1630.2(r) and Appendix Section 1630.2(r)). Although the complainant had no actual disability, as defined by law, management clearly perceived him as disabled (*i.e.*, having a medical condition that substantially limited his major life activities, such as not being able to lift over ten pounds, and not being able to perform a broad range of jobs).

The problem in this case, and in so many other cases like it in recent years, is that management failed to conduct the type of individualized assessment required to determine (1) if there is a

significant risk of substantial harm, and, if so, (2) whether a reasonable accommodation might eliminate the risk, or at least reduce it to an acceptable level. Instead, management denied the individual an employment opportunity based merely on a conclusory medical opinion that cited no established medical standards. The medical opinion provided no specifics as to the nature, severity, probability, or imminence of the potential harm. Finally, the overall assessment failed to consider factors such as the complainant's prior work history in similar jobs; and whether or not an accommodation was possible.

V

COMPLAINANT'S BELIEF THAT SHE WAS RETALIATED AGAINST IS NOT EVIDENCE OF RETALIATION

A nurse filed an EEO complaint alleging, among other things, that management officials retaliated against her because of her prior EEO complaint activity in connection with her reassignment to the Emergency Room (ER), the denial of her request for a reassignment to the Intensive Care Unit (ICU), and the denial of her request for twelve months of extended educational leave.

In response to her claim, management officials articulated several business-related reasons that necessitated these actions. The complainant, on the other hand, offered no evidence whatsoever that similarly situated employees who had not engaged in prior EEO activity were treated more favorably concerning matters involving duty assignments and leave requests. Nor did she present any evidence that she was treated differently after she filed her prior EEO complaints. Moreover, she offered no evidence challenging the reasons cited by management for its actions. Finally, she provided no other evidence, direct or indirect, that would link these events to her prior EEO activity. In essence, she based her claim on little more than her subjective belief that these things happened to her because of her prior EEO activity. Thus, OEDCA accepted an EEOC administrative judge's recommended decision finding no retaliation.

It is important for complainants to understand that successful prosecution of an EEO claim requires evidence that is relevant, reliable, credible, and above all, convincing. Simply believing that discrimination or retaliation occurred is not sufficient. Indeed, such a belief, no matter how firmly or sincerely held, is not even evidence. In the final analysis, fact-finding bodies such as OEDCA, the EEOC, and U.S. district courts will decide cases based, not on a subjective belief, but on whether or not the complaining party has presented convincing evidence (*i.e.*, a "preponderance of the evidence") in support of that belief.

The EEOC administrative judge in this case also noted that, without convincing evidence of discrimination or reprisal, fact-finding bodies (such as OEDCA and EEOC) will not attempt to second-guess management's actions, even if those actions appear to be "unfair" or reflect poor business judgment. The EEOC judge went on to quote language found in several recent appellate court decisions stating that our nation's civil rights laws "were not designed to

provide a forum for employees to state their objections to legitimate employment practices; nor were these laws intended to burden [fact-finding bodies] with the task of acting as 'super personnel departments' to divine whether an employer's decision was just or proper."

The issue, therefore, is not whether management made fair and wise decisions. A bad decision -- even an unfair decision -- does not necessarily violate civil rights laws. Instead, the issue is whether there is a preponderance of credible evidence that the decision was due to discrimination or retaliation. Merely believing that to be the case, without convincing evidence to support such belief, is insufficient.

VI

NO DISCRIMINATION FOUND WHERE SELECTING OFFICIAL WAS UNABLE TO LOCATE COMPLAINANT TO SCHEDULE AN INTERVIEW

A complainant applied for a food service position. A personnel specialist found him qualified and referred him to the selecting official, along with several other applicants.

The selecting official attempted to contact the complainant by phone to schedule an interview. She called the number listed on his application. However, the person who took the call at that number advised her that the complainant no longer lived at that address and his current whereabouts was unknown. She also attempted unsuccessfully to locate the complainant through the references contained in his application.

The selecting official proceeded with the interview process and eventually selected an African-American female. The interviews apparently played a major role in her decision, as evidenced by the reasons given for her selection. She noted that the selectee was "tidy in appearance", appeared to have good personal hygiene, demonstrated a caring attitude, responded well to questions concerning her physical ability to do the work, and was flexible with regard to scheduling.

The complainant subsequently received a notice of his nonselection at the address listed on his application. He admitted, however, that he did not live at that address during the period when applicants were being interviewed. Nevertheless, he alleged that his nonselection was due to his race and gender (African-American, male). The selecting official denied this allegation, pointing to a non-discriminatory selection history, reasonable efforts to contact him for an interview, and legitimate, non-discriminatory reasons for her decision (which, in large part, were based on the results of the interview process).

The complainant offered no evidence to demonstrate that those reasons were a pretext (*i.e.*, were not the true reasons) for his non-selection. Accordingly, OEDCA issued a decision in the Department's favor.

VII

DEPARTMENT FOUND LIABLE FOR SEXUAL HARASSMENT COMMITTED BY A FORMER MEDICAL CENTER DIRECTOR AND REQUIRED TO PAY COMPENSATORY DAMAGES

A female employee filed a complaint alleging that a former medical center director sexually harassed and abused her. Although the director was not her first or second level supervisor, he nevertheless required her to report directly to him.

She alleged that he engaged in a pattern of harassment and mistreatment after she rejected his requests, made on more than one occasion, that they have a relationship. The harassment included, among other things, making comments about her breasts, shouting and directing profanity at her; and telling her that he longed "for the days when, if a woman was out of line, you could just slap her around." He also criticized her for allegedly poor performance despite persuasive evidence to the contrary, and eventually forced her to accept reassignment to a position for which she was not qualified.

She further alleged that, following her reassignment, the harassment did not abate. On one occasion, the director instructed her new supervisor to remove any of her duties that would require her to enter the main building. On another occasion, during a highway cleanup project sponsored by the medical center, the director approached her, reached down to tie her shoestrings, and told her he had heard that "when you're going to murder someone, you tie their shoes backwards."

An IG investigation report confirmed her allegations, and she subsequently filed a discrimination complaint. In light of the IG's report, the Department admitted liability at the hearing stage of the complaint process and challenged only the amount of damages requested.

After receiving and considering evidence on the issue of monetary damages, an administrative judge recommended that the Department issue a final decision finding that the complainant was sexually harassed. In addition, the judge recommended that she receive a specified amount of monetary damages to compensate her for the medical costs, mental anguish, and emotional distress resulting from the harassment.

OEDCA accepted the administrative judge's recommendation and found that the complainant was sexually harassed as alleged in her complaint. It further found that she was entitled to appropriate equitable relief and reasonable attorney's fees. Moreover, after conducting its own review of the evidence relating to her claim for compensatory damages, OEDCA agreed with and awarded the amount recommended by the administrative judge. The amount was consistent with the evidence presented by the complainant and the range of monetary damages awarded in similar cases.

VIII

COMPLAINANT'S REMOVAL FROM HER SUPERVISORY POSITION AND

PLACEMENT ON A *PERFORMANCE IMPROVEMENT PLAN* WAS IN RETALIATION FOR HER PRIOR EEO COMPLAINT.

The complainant, the head nurse in an OR, had previously filed an EEO complaint alleging discrimination against her by the Chief of Surgery. Three weeks later, the Assistant Director of the Nursing Service (hereinafter the responsible management official, or "RMO") removed her from her supervisory position in the OR where she had worked for fifteen years (ten as a supervisor). In addition, the RMO assigned her to a non-supervisory position with different duties for which she lacked training; and eventually placed her on a Performance Improvement Plan ("PIP") because of unsatisfactory performance. She thereafter filed a complaint alleging that these and other actions against her were taken in retaliation for her prior EEO complaint against the surgery chief.

The RMO, who was aware of the complainant's EEO complaint, claimed that the actions taken against the complainant were the result of performance problems, not her EEO complaint against the surgery chief. The Chief of Nursing Service testified that the complainant's removal from the OR was the culmination of performance problems spanning a two to three-year period prior to her removal, and thus, not the result of her EEO complaint three weeks earlier.

As for the removal, the evidence showed that the complainant had worked as a supervisor in the OR for ten years, apparently without criticism of her performance. The RMO admitted that the complainant had never received any verbal counseling, written notice, or other documentation prior to her EEO complaint against the surgery chief suggesting that her performance was somehow deficient. After she filed her complaint, however, the surgery chief informed the RMO of his displeasure with the complainant, and threatened to leave and take all of the residents with him.

Further evidence of reprisal was seen in the circumstances leading up to her placement on a PIP. The RMO claims that the complainant had the necessary skills and should have quickly adjusted to her new ward duties following her removal from the OR. The complainant, however, noted that she had worked as an OR nurse since graduating from nursing school and had no prior experience or training to deal with her new and very different duties as a floor nurse on a busy ward. She further claimed that she received no on-the-job or other training after arriving on the ward, and that she had essentially been set up to fail.

Persuasive evidence in the record supported the complainant's version of the facts. The nurse assigned to train her (her "preceptor") confirmed that there was an enormous difference (a "whole different ball of wax" as she described it) between the complainant's present duties and her former specialized work environment and duties. She further confirmed that the complainant lacked the training and experience to do the job, that the RMO refused to send her to a refresher

course, and that there was simply no time to train her because of the chaotic work environment on the ward. She described the complainant as a hard worker who "gave 150%", but who received no support despite her (the preceptor's) efforts to persuade the RMO that, without some help, the complainant would fail.

After reviewing the record in its entirety, OEDCA concluded that the reasons articulated by management for their actions were a pretext for retaliation against her because of her earlier EEO complaint.

IX

U.S. SUPREME COURT RESOLVES SEVERAL ISSUES RELATING TO CLAIMS OF DISABILITY DISCRIMINATION UNDER THE *AMERICANS WITH DISABILITIES ACT OF 1990.*

The Supreme Court recently resolved several controversial issues that frequently arise in cases that allege employment discrimination due to a disability.

In *Cleveland v. Policy Management Systems Corp*., the Court ruled that an individual's claim of "total disability" in a Social Security Disability Insurance (SSDI) application under the *Social Security Act* (SSA) is not necessarily inconsistent with, and does not automatically bar, a simultaneous claim made under the *Americans With Disabilities Act* of 1990 (ADA) that he or she can perform the essential functions of a position with a reasonable accommodation.

In this case, a plaintiff had applied for, and was eventually awarded SSDI benefits by the Social Security Administration. In her SSDI application she represented that she was "totally disabled" due to a stroke that damaged her concentration, memory, and language skills.

The week before she received her SSDI award, however, she filed suit under the ADA alleging disability discrimination against her former employer who, she claimed, had terminated her employment without attempting to reasonably accommodate her disability. Hence, on the one hand she was claiming before the Social Security Administration that she could no longer work because she was "totally disabled", while at the same time claiming before the courts that she was still capable of working, if she was given a reasonable accommodation.

Although these claims might appear, on their face, to be inconsistent, the Court noted that, in some cases, they can be perfectly consistent with each other. The court emphasized that the plaintiff had not made any inconsistent factual claims about specific tasks or functions she could or could not do. Had she done so, such inconsistencies might have been fatal to her discrimination claim under the ADA if she were unable to explain adequately the inconsistency. Instead, her SSDI claim merely stated, in essence, that she was "totally disabled" (that is, totally disabled for purposes of eligibility for benefits under the *Social Security Act)*. Such an assertion is a legal conclusion rather than a factual claim.

The SSA (like other disability benefit programs such as workers' compensation laws and employer disability insurance plans) does not take into consideration the fact that the applicant might have been able to continue working if only the applicant's former employer had been willing to accommodate the disability. Because SSDI applicants are not required by the SSA to refer to the possibility of accommodation when applying for benefits, and because the Social Security Administration does not consider that possibility when determining eligibility for SSDI benefits under the SSA, simultaneous claims under the SSA and the ADA are not necessarily inconsistent with each other and, in fact, will often complement each other. Thus, an individual is not required to choose between applying for disability benefits after losing a job due to a disability and vindicating his or her rights under the ADA.

It is important to bear in mind that while applying for disability benefits does not automatically bar an individual from bringing an ADA claim, factual representations made by an individual while pursuing such benefits may be relevant -- though not dispositive -- evidence in determining whether the individual is a "qualified individual with a disability" as defined by the ADA.

When assessing the effect such representations may have on this determination, the focus must be on the exact definition of "disability" used by the benefits program in question, the precise content of the individual's factual representations made in the claim for benefits, and the specific circumstances surrounding the application for disability benefits. The EEOC's previously issued enforcement guidance on this topic (*EEOC Guidance: Benefits Applications and ADA Claims*, *2/12/97*, EEOC Compliance Manual, Vol. 3, N:2281) provides EEO investigators with a useful list of factors to consider when making this assessment.

In three other cases, *Sutton et al. v. United Air Lines, Inc*.; *Murphy v. United Parcel Service, Inc*.; and *Albertsons, Inc. v. Kirkingburg*, the court resolved issues regarding the determination of whether an individual is disabled within the meaning of the ADA.

In the *United Airlines* case, twin sisters, each with severe myopia, were refused employment as pilots because they failed to meet minimum vision requirements established by the airline, *i.e.*, uncorrected visual acuity of 20/100 or better. Each sister had uncorrected visual acuity of 20/200 or worse in one eye and 20/400 or worse in the other eye. However, with the use of corrective lenses, each had vision of 20/20 or better. Without corrective lenses, each was unable to conduct numerous everyday activities such as driving a car, watching television, shopping, *etc.* With corrective lenses, however, they could function identically to individuals without a similar impairment.

In the *Murphy* case, United Parcel Service dismissed an employee from his job as a mechanic because of his high blood pressure. One of the essential job requirements was that he drive commercial motor vehicles, which in turn required that he be certified as

physically qualified to drive such vehicles by the Department of Transportation (DOT). At the time of his dismissal, his blood pressure was so high, he was unqualified for DOT certification. Without medication, his blood pressure was approximately 250/160. With medication, however, his hypertension did not significantly restrict his activities and he could function normally and engage in activities that other persons normally do.

In the *Albertsons* case, a truck driver for a grocery-store chain was discharged after failing to meet DOT's basic vision standards for commercial truckdrivers, *i.e.*, at least 20/40 corrected in each eye, and distant binocular acuity of at least 20/40. He had an uncorrectable condition that left him with 20/200 vision in his left eye, and thus effectively monocular vision.

In each of these cases, the plaintiffs filed a lawsuit alleging that the actions of the employer discriminated against them because of their disability in violation of the ADA. In each of the cases, the Supreme Court clarified, and narrowed the scope of, the ADA's definition of the term "disability."

The Court noted that one way an individual may meet the definition of "disability" under the ADA is to prove the existence of a physical or mental impairment that **substantially limits** one or more of the major life activities of the individual. In the first two cases, the Court decided that the determination as to whether an individual's impairment "substantially limits one or more major life activities" must take into account any mitigating measures that the individual employs. In other words, a person whose physical or mental impairment is corrected by medication or other measures or devices, such as corrective lenses, does not have an impairment that substantially limits a major life activity, even though the impairment, if left uncorrected, would, might, or could be substantially limiting.

In the third case, the Court cautioned against assuming that certain types of impairments, such as uncorrectable monocular vision, will automatically constitute a disability (*i.e.*, will always be substantially limiting). The Court noted that such determinations must be made on a case-by-case basis, not simply on the basis of the name or diagnosis of the impairment. The determination must consider the unique circumstances of the individual with the impairment, *e.g.*, whether there are bodily mechanisms that compensate for the impairment and the actual extent of the limitation for that particular individual.

While most individuals with monocular vision will "ordinarily" meet the ADA's definition of disability, some may not. The ADA requires individuals claiming the Act's protection to prove a disability by presenting evidence that the extent of the limitation, in terms of their own experience, is substantial.

The Court also cautioned against equating "significant limitations" on an individual's major life activities with "significant differences" in the manner in which the impaired individual performs those activities. In other words, an impairment may cause an individual to perform a major life activity in a significantly different manner, yet not

substantially limit that activity.

The Court went on to note in the *Murphy* and *Sutton* cases that an individual may also meet the statutory definition of having a "disability" even if he or she does not have a substantially limiting impairment, but is regarded by an employer as having such an impairment. The plaintiffs in those two cases argued that even if they did not have substantially limiting impairments, UPS and United Airlines regarded them as having such impairments and, thus, they met one of the alternative definitions of "disability" under the ADA.

The Court, however, disagreed; noting that neither employer regarded the plaintiffs as substantially limited in their ability to work in a class of jobs, or in a broad range of jobs in various classes. In other words, the employers did not regard the plaintiffs as substantially limited in their ability to work as a mechanic or a pilot. Rather, they merely regarded the plaintiffs as unable to work as a UPS mechanic (because of the DOT certification requirement) or as a United Airlines pilot (because of UA's minimum vision requirement). Each of the plaintiffs was still qualified for, and not precluded from, employment in other jobs that exist in the same broad class of jobs. In other words, the pilots could still work as co-pilots, pilot instructors, pilots for courier services, and other similar jobs that do not have the same minimum vision requirement. Likewise, the mechanic would still be qualified for numerous jobs as a mechanic, most of which do not require a DOT health certification. To be substantially limited in the major life activity of working, one must be precluded from more than just one type of job, a specialized job, or a particular job of choice (such as a higher paying job). As long as jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.

These three decisions significantly curtail the scope of the ADA (and the *Rehabilitation Act* in the case of Federal employment) with respect to the types of physical or mental impairments that will qualify as a disability.

X

THE SUPREME COURT RULES THAT FEDERAL AGENCIES MAY AWARD COMPENSATORY DAMAGES IN THE ADMINISTRATIVE EEO COMPLAINT PROCESS

In a recent decision, the Supreme Court ruled that the EEOC has the legal authority to require Federal agencies to pay compensatory damages when they discriminate in employment. Prior to the ruling, there was disagreement among the federal circuit courts that had considered the question.

In light of the Court's opinion, the EEOC and Federal agencies may continue to award compensatory damages in appropriate cases, provided such damages are otherwise authorized by law.

Thus, the Court's decision does not change the rule that damages are not available in age discrimination claims brought under the *Age Discrimination in Employment Act* (the ADEA). Nor are such damages available in disability

discrimination cases involving the provision of reasonable accommodation, where the employer is able to demonstrate good-faith efforts to identify and make a reasonable accommodation.